

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|   |   |                        |
|---|---|------------------------|
| <b>RONALD ROSS</b>                      | ) |                        |
| Claimant                                | ) |                        |
| VS.                                     | ) |                        |
|   | ) |                        |
| <b>WALLACE ENERGY, d/b/a</b>            | ) | Docket No. 172,215 and |
| <b>WALLACE OIL RECLAIMING</b>           | ) | 172,216                |
| Respondent                              | ) |                        |
| AND                                     | ) |                        |
|   | ) |                        |
| <b>TRAVELERS INSURANCE COMPANY</b>      | ) |                        |
| Insurance Carrier                       | ) |                        |
| AND                                     | ) |                        |
|   | ) |                        |
| <b>KANSAS WORKERS COMPENSATION FUND</b> | ) |                        |

**ORDER**

**ON** the 2nd day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of a Nunc Pro Tunc Award entered by Administrative Law Judge George R. Robertson, on November 3, 1993, came on for oral argument by telephone conference.

**APPEARANCES**

Claimant appeared by his attorney, John M. Ostrowski, of Topeka, Kansas. Respondent and insurance carrier appeared by their attorney, Jerry M. Ward, of Great Bend, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jerry Moran, of Hays, Kansas. There were no other appearances.

**RECORD**

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

**STIPULATIONS**

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

**ISSUES**

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to future medical benefits?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

**Docket No. 172,215**

(1) While working for the respondent on November 24, 1990, the claimant sustained a personal injury arising out of and in the course of his employment. As the direct result of such personal injury, the claimant's ability to perform work in the open labor market has been reduced by seventy percent (70%) and his ability to earn comparable wages has been reduced by sixty percent (60%). Following the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Appeals Board finds, pursuant to the facts and circumstances of this particular case, that both factors should be given equal weight and therefore, finds and concludes that the claimant has suffered a sixty-five percent (65%) permanent partial general work disability.

On November 24, 1990, the claimant, in the process of performing his regular duties as an employee for the respondent, walked over the top of a dirt dike and had his feet go out from under him, he turned his head, put his arm down and hit the ground with a bang.

After the accident, claimant first sought medical treatment for his pain and discomfort in both his neck and low back areas from Vinton K. Arnett, D.C., in Hays, Kansas, from December 13, 1990 through April 2, 1991. Prior to the claimant's accident, the claimant had previously been treated by Dr. Arnett and also Dwight Perrey, D.C., for occasional neck and lower back pain and discomfort. During the treatment that claimant received from Dr. Arnett, the claimant was kept off work and finally referred by the respondent's insurance carrier to Dr. C. Reiff Brown, an orthopedic surgeon, in Great Bend, Kansas, for treatment on February 6, 1991.

Dr. Brown's diagnosis was early degenerative disc disease at L4-L5 which was aggravated by the fall claimant sustained on November 24, 1990. The claimant's past history of chiropractic treatment for low back pain was consistent with progressively increasing degenerative disc problems. Dr. Brown treated the claimant conservatively with an exercise program, anti-inflammatory medication and some trigger injections in the low back area. Dr. Brown did not treat the claimant for neck pain, however, Dr. Arnett was treating the claimant for both neck and low back pain during the same period of time of Dr. Brown's treatment.

The claimant remained off of work from November 24, 1990, until Dr. Brown returned him to work on a four-hour per day basis on June 3, 1991. The claimant's hours were increased to six hours per day on June 17, 1991, and finally eight hours per day on July 16, 1991. After an examination of claimant on August 22, 1991, Dr. Brown was of the opinion that the claimant was at a point of maximum medical improvement and had a seven percent (7%) permanent partial impairment of function of the body as a whole as a result of his injury. Dr. Brown went on to place permanent work restriction of lifting on an occasional basis 100 pounds maximum and 15 pounds maximum on a frequent basis with proper body mechanics.

At the time of the claimant's accidental injury, he had been in the occupation of a truck driver for over thirty years which constituted all of his adult life. Prior to his accident, the claimant had experienced low back and neck problems due to his normal truck driving duties. Even though he had previously been treated for prior back problems, he had not lost any time from work.

The claimant testified that his back condition did not improve very much as a result of the medical treatment that he received between November of 1990 and when he returned to work in June of 1991. However, he had a strong desire to return to work so he did without additional complaints. The respondent, while the claimant was off of work, hired another driver to help the claimant which allowed him not to lift more than he had to. The claimant remained in the employment of the respondent until October 30, 1991, when he woke up in the morning and could not get out of bed because of the pain in his neck and low back. As of April 13, 1993, the date of his evidentiary deposition, the claimant had not been gainfully employed since October 30, 1991, and he further testified that he had had no improvement in his condition since his accident of November 24, 1990. The claimant's disabling pain complaints are in his neck, back and spine, the same places that

the pain originated after the November 24, 1990 accident. His employer, Richard Wallace, established that the claimant returned to work even though not feeling great and worked until he couldn't work anymore. He was not one to shirk responsibilities or hours and would work if he was able to.

After the claimant left work on October 30, 1991, he was treated by a number of physicians including Dr. Brown who last saw the claimant on November 19, 1991. During this examination, Dr. Brown found the claimant to have low back pain on the right; pain in the sacroiliac area; pain radiating upward into the thoracic and neck muscles causing occipital headaches and tightening in the neck. Dr. Brown was unable to account for the claimant's marked increase in symptoms and was of the opinion that the claimant was subjectively temporarily totally disabled at this time because of pain. Dr. Brown did not see the claimant again and suggested that he be referred to a back specialist for further treatment. Dr. Brown had no opinion on his restrictions after his November 19, 1991 examination because he never examined the claimant after he determined he was subjectively temporarily totally disabled.

Drs. Eyster, Lesko and Hered of Wichita, Kansas, either evaluated or treated the claimant for his continuing neck pain. Dr. P. Brent Koprivica evaluated the claimant at the request of the claimant's attorney. Dr. Brown, treating physician, and Dr. Koprivica, evaluating physician, provided evidentiary depositions which are contained in the record. Dr. John Hered's medical report was stipulated into the record which concluded that the claimant's cervical spine showed degenerative changes and bulges at C3-C4 and C4-C5 but no real compression of neural elements. He recommended conservative treatment with a physiatrist in Hays, Kansas. Neither Dr. Eyster's nor Dr. Lesko's medical reports or records were entered into the evidentiary record of this case.

On December 28, 1992, P. Brent Koprivica, M.D., evaluated the claimant at the request of the claimant's attorney. Dr. Koprivica is board certified in emergency medicine and has been practicing in occupational medicine since 1981. Dr. Koprivica's current practice consists of 80 percent evaluation work of assigning permanent impairment, with fifty percent for claimants and fifty percent for insurance companies. Dr. Koprivica personally took a medical history from the claimant and performed an extensive physical examination. He also reviewed the medical records of Dr. Brown, Dr. Eyster, Dr. Lesko, and Dr. Hered. In addition, he interpreted an MRI of the claimant's cervical area which showed degenerative disc disease at C4-C5 and C5-C6 and some posterior bulging.

After Dr. Koprivica's comprehensive examination of the claimant, he concluded that in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, that in regard to the cervical spine region, the claimant had suffered a fifteen percent (15%) whole person impairment as a result of his November 24, 1990 occupational accident. It is Dr. Koprivica's opinion that the claimant has no symptom magnification considering his complaints of both his back and neck. Claimant related to Dr. Koprivica that he had not re-injured his neck after he returned to work for the respondent on June 3, 1991. It is Dr. Koprivica's opinion that the claimant's

present condition and increased symptomatology after June 3, 1991, when claimant returned to work, was an exacerbation and not a true aggravation.

Due to the claimant's cervical problems, Dr. Koprivica placed the following work restrictions on the claimant:

- (a) Avoid activities which require sustained extension of the neck;
- (b) Avoid repetitive activities above shoulders with or without weights;
- (c) Avoid repetitive motion activities of the neck.

With respect to the claimant's lumbar area, Dr. Koprivica opined in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, that the claimant had a ten percent (10%) permanent impairment of the lumbar region. He then combined the lumbar and cervical impairments for a twenty-four percent (24%) functional impairment of the body as a whole. The claimant's lumbar problem is a chronic mechanical low back pain or a musculoskeletal low back pain. Dr. Koprivica further established that the November 24, 1990 accident, was the event that resulted in the claimant's low back injury, causing functional impairment and work restrictions in this area.

Because of the claimant's low back condition, Dr. Koprivica recommended the following work restrictions:

- (a) Avoid exposure to vibration;
- (b) Lifting limit of 30 pounds on a one-time basis;
- (c) Avoid activities which require repetitive bending, pushing, pulling, and twisting.

He specifically states that the claimant cannot return to truck driving activities.

Jim Molski, vocational rehabilitation consultant, testified on behalf of the claimant, concerning the loss of claimant's ability to perform work in the open labor market and to earn comparable wages. Mr. Molski personally interviewed the claimant; reviewed medical reports; and reviewed vocational rehabilitation vendor reports in regard to claimant's capacity for vocational rehabilitation. Utilizing his education, personal experience and knowledge along with the dictionary of occupational titles, labor market access plus 1992 computer program and Kansas wage survey, he formulated his opinion on the claimant's loss of his ability to perform work in the open labor market and to earn comparable wages. Mr. Molski's opinions were based also on the work restrictions which the evaluating or treating physicians placed on the claimant as a result of his injury. However, the only work restrictions placed on the claimant after he had his increased symptomatology on October

30, 1991, were the restrictions that Dr. Koprivica placed on him after his examination. Mr. Molski did use the restrictions of Dr. Eyster and Dr. Lesko, however, neither of these doctors' records were admitted into the record as evidence in this case.

Mr. Molski is of the opinion that the claimant's ability to perform work in the open labor market has been reduced in the range of five to seven percent based on Dr. Brown's work restrictions. With respect to Dr. Koprivica's work restrictions, he is of the opinion that claimant's ability to perform work in the open labor market has been reduced by 70 to 75 percent. In addition, using a pre-injury wage of \$543.00 per week and based on the claimant's ability to work 40 hours per week and earn \$4.50 to \$5.00 per hour at the present time, the claimant has lost 59 to 63 percent of his ability to earn comparable wages.

The Administrative Law Judge in this case found that as a result of the claimant's accidental injury which occurred on November 24, 1990, while employed by the respondent, no permanent partial disability occurred either in the form of functional or work disability. Such accident only resulted in temporary total disability payment of 33.43 weeks.

The claimant argues that the accident of November 24, 1990, resulted not only in temporary total disability payments but also in a seven percent permanent partial disability based on Dr. Brown's opinion of impairment of function.

The respondent contends that the November 24, 1990 accident caused the claimant's permanent partial general work disability. Such work disability should be calculated on the average of Mr. Molski's opinion utilizing Dr. Brown's restrictions and Dr. Koprivica's restrictions which would result in a 35.75 percent permanent partial general work disability.

With respect to the issue as to which date of accident caused the permanent partial disability, the Appeals Board after carefully reviewing the whole evidentiary record finds and concludes that based on the credible evidence presented by the claimant and as particularly set forth by Dr. Koprivica, the traumatic fall which the claimant sustained on November 24, 1990, clearly resulted in the claimant having a permanent partial general disability.

The Appeals Board further finds and concludes that such work disability should be established based on the uncontradicted evidence presented by Jim Molski, a vocational rehabilitation consultant. Mr. Molski's opinions should be predicated on Dr. Koprivica's restrictions, as these restrictions were formulated after the claimant's symptoms increased on October 30, 1991. It is Mr. Molski's opinion that based on Dr. Koprivica's work restrictions, the claimant's ability to perform work in the open labor market has been reduced by 70 to 75 percent. In addition, his ability to earn comparable wages has been reduced by 59 to 63 percent using a pre-injury wage of \$543.00 per week. However, the parties stipulated that the average weekly wage of the claimant for the accident which

occurred on November 24, 1990, was \$495.84 per week. Using \$495.84 as a pre-injury wage and \$200.00 as a post-injury wage, then the claimant's ability to earn comparable wages has been reduced by 60 percent.

The Administrative Law Judge in this case states that the court need not average the two-prongs of the Hughes test if it determines that a work disability is to be given. However, even if Hughes does not mandate that a court use a particular formula to arrive at the extent of permanent disability, the court does require consideration of the two factors, loss of ability to perform work in the open labor market and to earn comparable wages, when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). In the instant case, the Appeals Board, considering the whole evidentiary record, finds and concludes that both factors should be weighed and averaged equally and the claimant should be entitled to a sixty-five percent (65%) permanent partial general disability award based on work disability. Hughes, *supra* at 422.

(2) Total medical expenses in Docket No. 172,215 (November 24, 1990) paid by the respondent amounted to \$3,813.88. Vocational rehabilitation costs of \$706.55 were paid along with medical management in the amount of \$841.40.

(3) The claimant has noted that there has been an underpayment of temporary total disability of 33.43 weeks in Docket No. 172,215.

The average weekly wage stipulated by the parties would make claimant eligible for the maximum \$278.00 per week for the date of accident, November 24, 1990, so that there is an underpayment of temporary total disability that shall be considered when calculating the award below.

### **Docket No. 172,216**

(1) The respective parties in this case stipulated to the issue that the claimant met with personal injury by accident arising out of and in the course of his employment with the respondent during a series of accidents from July 15, 1991 through October 30, 1991. However, while such series of accidents did render the claimant temporarily totally disabled for 30.29 weeks, the Appeals Board finds that the series did not cause any permanent partial general disability in the form of a functional impairment or work disability.

Dr. Koprivica's testimony established that the November 24, 1990 accident was a causal event that aggravated the claimant's preexisting degenerative disc disease and resulted in permanent impairment and work restrictions. It is Dr. Koprivica's opinion that the claimant's increased symptomatology was an exacerbation and not a true aggravation after he had returned to work on June 3, 1991, and until he quit work on October 30, 1991.

The claimant's back condition did not improve very much as a result of the medical treatment he received from November of 1990 until he returned to work in June of 1991.

The claimant's disabling complaints are in his neck, back and spine, the same places the pain originated after the November 24, 1990 accident. His employer established that the claimant returned to work even though he was not feeling great and worked until he couldn't work any more. He was not one to shirk responsibilities or hours and would work if he was able to. The claimant indicated that he did not have a new injury after November 24, 1990, in the history that he gave Dr. Koprivica during his examination.

Based on the credible evidence presented by the testimony of the claimant and Dr. Koprivica, the Appeals Board finds and concludes that the series of accidents which the claimant sustained from July 15, 1991 through October 30, 1991, rendered the claimant temporary totally disabled for 30.29 weeks but did not cause any additional permanent general disability in the form of functional or work disability. The Appeals Board is mindful of the fact that the claimant did return to full-time work for the respondent to an accommodated job on July 16, 1991. However, as previously set forth, the credible medical evidence as presented by Dr. Koprivica establishes that no additional permanent partial disability resulted from these full-time work activities.

(2) Total medical expenses in Docket No. 172,216 (October 30, 1991) paid by the respondent amounted to \$5,312.12. Vocational rehabilitation costs in said case amounted to \$2,467.00.

### **AWARD**

#### **Docket No. 172,215**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Nunc Pro Tunc Award of Administrative Law Judge George R. Robertson, dated November 3, 1993, is modified as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF the claimant, Ronald Ross, and against respondent, Wallace Energy d/b/a Wallace Oil Reclaiming, and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund. The claimant is entitled to 33.43 weeks of temporary total disability benefits at the rate of \$278.00 per week for a total of \$9,293.54, followed by 381.57 weeks at \$214.87 per week for a total of \$81,987.94 for a sixty-five percent (65%) permanent partial general disability making a total award of \$91,281.48. As of January 5, 1994, there would be due and owing to the claimant 33.43 weeks of temporary total disability benefits at \$278.00 per week in the sum of \$9,293.54 plus 77.14 weeks of permanent partial general disability benefits at \$214.87 per week in the sum of \$16,575.07 for a total due and owing of \$25,868.61 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$65,412.87 shall be paid at \$214.87 per week for 304.43 weeks or until further order of the Director.

#### **Docket No. 172,216**



**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Nunc Pro Tunc Award of Administrative Law Judge George R. Robertson, dated November 3, 1993, is modified as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF the claimant, Ronald Ross, and against respondent, Wallace Energy d/b/a Wallace Oil Reclaiming, and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund. The claimant is entitled to 30.29 weeks of temporary total disability benefits at the rate of \$289.00 per week for a total of \$8,753.81. Said amount shall be paid forthwith, less any amounts previously paid.

- (1) The claimant is awarded authorized medical expenses to the date of the Award.
- (2) The claimant is awarded unauthorized medical expenses up to \$350.00.
- (3) The claimant is awarded future medical expenses upon proper application and approval by the Director.
- (4) Per its stipulation with the respondent, the Kansas Workers Compensation Fund is ordered to reimburse the respondent and insurance carrier seventy-five percent (75%) of the following expenditures in both Docket No. 172,215 and Docket No. 172,216:
  - a. All temporary total disability benefits;
  - b. All permanent partial disability benefits previously paid or hereinafter to be paid;
  - c. All medical expenses previously paid or hereinafter to be paid; and,
  - d. All administrative expenses.
- (5) Costs are assessed to the respondent, with reimbursement from the Kansas Workers Compensation Fund pursuant to the above stipulation in both docketed cases.
- (6) Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent (with reimbursement by the Kansas Workers Compensation Fund per stipulation) and such are directed to pay costs of the transcripts as follows:

OWENS, BRAKE & ASSOCIATES

|  |                  |
|--|------------------|
| Regular Hearing Transcript,<br>Dated February 17, 1993 | \$ 191.21        |
| Deposition of Ronald Ross,<br>Dated April 13, 1993     | \$ <u>289.63</u> |

RONALD ROSS

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DOCKET NO. 172,215 AND 172,216

Total \$ 480.84

UNDERWOOD AND SHANE

Deposition of Dr. C. Reiff Brown,  
Dated April 13, 1993 \$ 316.00

Deposition of Richard Wallace,  
Dated May 12, 1993 \$ 317.85

Total \$ 633.85

DON K. SMITH & ASSOCIATES

Deposition of James Molski,  
Dated March 5, 1993 \$ 303.00

GENE DOLGINOFF ASSOCIATES, LTD.

Deposition of Dr. Brent Koprivica,  
Dated March 2, 1993 \$ 486.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 1994.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

cc: John M. Ostrowski, P.O. Box 1453, Topeka, Kansas 66601-1453  
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George R. Robertson, Administrative Law Judge  
George Gomez, Director